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SIPDIS

SENSITIVE
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STATE FOR SCA/CEN (O'MARA) AND EB/TPP/IBE (JBOGER)
STATE PASS USTR FOR JCCHOE-GROVES
COMMERCE FOR ITA/MAC/OIPR (CPETERS)

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SUBJECT: KAZAKHSTAN: SPECIAL 301

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¶11. (SBU) Summary: In 2006, Kazakhstan made further progress in its efforts to protect Intellectual Property Rights (IPR). Legislation passed in November 2005, combined with stepped-up enforcement efforts, further tipped the economic scales against piracy. President Nazarbayev underscored the importance of IPR protection in his annual address to the nation, providing critical high-level impetus to IPR enforcement efforts. In other positive developments, the civil courts emerged as an effective force in protecting IPR rights, and the IPR Commission has clearly embraced the need to grant ex officio status to customs officials. Enforcement efforts have succeeded in eliminating storefront distributors of pirated materials; ironically, however, this success has spawned Kazakhstan's "next generation" enforcement concern: the proliferation of sidewalk vendors of pirated materials. While Kazakhstan retains certain broad, institutional deficiencies in the IPR domain - including a puzzling lack of jail sentences to date for convicted IPR criminals -- the Government of Kazakhstan (GOK) has demonstrated its resolve to confront piracy, and has generated significant momentum in implementing reform. For that reason, post recommends keeping Kazakhstan off the Special 301 Watchlist. End summary.

2006 - ENFORCEMENT GAINS MOMENTUM

¶12. (U) The past year served as a testing ground for the November 2005 amendments (Ref A) that markedly toughened the penalties for IPR infringement and closed significant loopholes. Several key indicators point toward the efficacy of this legislation in further improving the situation on the ground.

¶13. (SBU) First, official statistics demonstrate an increasingly robust enforcement effort on the part of the authorities. According to government data, in 2006:

-- 2101 administrative inspections were conducted (compared to 1765 in 2005 and 1697 in 2004);

-- 121 million tenge (\$975,806) worth of goods was administratively confiscated (compared to 72 million tenge in 2005 and 75 million in 2004);

-- 1729 persons were subject to administrative action (compared to 1407 in 2005 and 1365 in 2004);

-- 14,385,725 tenge (\$116,013) was collected in administrative fines (compared to 10.5 million tenge in 2005, and 6.7 million in 2004);

-- 268 criminal cases were initiated (compared to 92 in 2005 and 64 in 2004).

14. (SBU) Unfortunately, Post could not obtain aggregated 2006 data on criminal convictions. (Both the IPR Commission and our private sector contacts suggest that the number of convictions likely trended upwards, roughly in parallel with the number of cases initiated.) Informally, the IPR Commission acknowledged the IIPA's point that few, if any, convictions have resulted in jail sentences.

Rather, the courts have to date preferred to either suspend sentences upon payment of compensation to the damaged parties, or oversee a reconciliation of the parties with a corresponding payment of damages. (Comment: While the lack of jail sentences for IPR crimes remains something of a mystery -- and a cause for concern -- it may be that the courts view the small-scale of most pirating operations as insufficient to justify incarceration. See para. 6. End comment.)

15. (SBU) Ironically, there is reason to believe that official data may actually underestimate the government's success in combating piracy. A prominent distributor of copyrighted material in Kazakhstan reports that, in at least one region, local authorities have been so effective in eradicating sales of pirated discs that their enforcement data (e.g. number of arrests) have begun to "suffer." While this is clearly not the case in all of Kazakhstan's markets, it does suggest that, in the future, additional measures of the GOK's effectiveness in combating IPR crimes may be needed.

16. (SBU) Available evidence points to the "miniaturization" of pirated product distribution in Kazakhstan. Distributors of pirated DVDs, CDs, etc., have increasingly been pushed to the margins of the marketplace, as enforcement efforts have succeeded in shutting down large, fixed distribution points. In the words of a well-informed private sector observer, Kazakhstan's piracy problem now consists of "micro-sellers" -- "mom-and-pop" operations which function with a single computer or VCR, and sell their products out of a box on

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major city streets, ready to shift locations or abandon their goods altogether upon the approach of law enforcement.

17. (SBU) Clearly, the problem of "micro-sellers" is far from insignificant. Too small, nimble, and ephemeral to constitute good targets for government bodies traditionally responsible for IPR enforcement (the Justice Ministry's IPR Committee, the General Procuracy, and the Financial Police), these operators seem to have developed, at least to some extent, successful "cat and mouse" strategies for dealing with local police. Making the regular police a more effective actor in controlling "micro-pirates" may require time and broader institutional changes.

PROTECTING IPR THE CIVIL WAY

18. (SBU) Key private sector observers inform Post that civil litigation is emerging as a highly effective tool in IPR protection. Civil courts are increasingly willing to rule in favor of the plaintiff-licensee in civil disputes with alleged infringers, and are becoming a substantial deterrent to trade in pirated goods. A related weakness, however, can be identified -- law enforcement officials often fail to inform the aggrieved party (i.e. the copyright holder or licensee) of administrative actions against pirates, thus denying the licensee an opportunity to open a parallel civil claim against the defendant.

REMAINING GAPS - REAL AND ILLUSORY

19. (SBU) A key outstanding issue for Kazakhstan is the granting of ex officio powers to customs officials. This is particularly important for Kazakhstan, given the fact that the market for "pirated" goods is dominated by imports. (An industry source estimated that 80% of the counterfeit goods in Kazakhstan cross into the country from Russia.) The country's extremely long and porous border with Russia poses a tremendous challenge. In addressing the ex officio issue, Kazakhstani officials have repeatedly expressed concern that granting additional powers may add to the institutional corruption of the customs authorities. Given

the endemic corruption known to exist in customs structures, Post has little reason to question the genuineness and legitimacy of these concerns. The customs ex officio issue has featured prominently in Kazakhstan's bilateral WTO accession negotiations with the U.S. In post's view, the IPR Commission, at least, has fully accepted the necessity of granting ex officio powers; delays in passing the necessary legislation appear to be driven by concerns over funding the necessary training programs, and efforts to develop mechanisms to minimize the opportunities for abuse of the authority.

A draft law incorporating ex officio powers (reportedly consistent with TRIPS) is currently being reviewed by the Prime Minister's office.

¶10. (SBU) The IPR Committee raised a parallel argument in regard to the IIPA's suggestion that the ex officio authority of the police be extended to the administrative arena. This, the GOK officials said, would also exacerbate corruption by opening a door for the police to accept bribes in return for downgrading charges from criminal to administrative. Granting ex officio powers to the police in pursuing administrative-level violations may certainly prove a useful tool in combating the "micro-sellers" discussed above. Still, it is useful to consider that, given the corruption-prone reality of many of Kazakhstan's post-Soviet institutions, extending the police powers may lead to unintended consequences. As in the case of granting ex officio powers to customs officials, the solution may lie in combining the grant of new powers with appropriate safety mechanisms or institutional reforms - a process which, realistically, may take time.

¶11. (SBU) GOK officials have told Post that they view the introduction of civil ex parte searches as unnecessary and irrelevant to the situation in Kazakhstan. The reason, they explain, lies in the nature of Kazakhstan's legal process, wherein all civil cases based on property issues must be based on claims from damaged parties. Notably, private sector industry representatives also told Post that they did not see the potential benefit of such provisions in Kazakhstan.

¶12. (SBU) The IIPA's assertion that the 2004 statutes only provide for a 50-year term of copyright protection is inaccurate, as the November 2005 amendments specifically provide for the extension of copyright protection to 70 years, in keeping with international standards (Ref A). The IIPA repeats another error from its 2006 report, overstating the minimum damages threshold for criminal prosecution (currently about \$9) by a factor of 35.

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¶13. (SBU) The IIPA also cites Kazakhstan's need to establish a legal basis for the confiscation and destruction of equipment used in the criminal manufacture of pirated goods. The IPR Committee has repeatedly assured post that a combination of statutes in the Criminal Code and the Criminal Procedure Code constitutes an adequate provision for the confiscation of such equipment. Moreover, the IPR Committee has stated, such confiscations are routinely carried out and do not require a court order. A court order is necessary only to destroy such equipment -- a procedural requirement which the IPR Committee defends as necessary to preserve potentially material evidence.

¶14. (SBU) The IPR Committee recently told Post that the GOK plans to draft amendments implementing WIPO digital treaties this year; following public and parliamentary debate, enactment would likely occur in early 2008. A regulatory scheme for the production and distribution of optical disc material and equipment is slated for development in 2008. There remains a strong consensus among both government and industry observers that no large manufacturers of pirated discs operate in Kazakhstan.

EVIDENCE OF STRONG POLITICAL WILL

¶15. (SBU) The past year witnessed a remarkable political impetus in favor of IPR protection in Kazakhstan. In his annual address to the nation on March 1, President Nazarbayev explicitly mentioned IPR. Most notably, he linked the need to protect IPR to the development

of a domestic high-tech industry and the diversification of Kazakhstan's economy away from the extractive sector -- both cornerstones of Kazakhstan's current economic policy. This was, by some accounts, a breakthrough in presenting IPR protection as a policy driven by Kazakhstan's national interests. In conversation with Econoff, a leading distributor of copyrighted materials credited Nazarbayev's speech for spurring law enforcement agencies to increase their anti-piracy efforts, as well as for discouraging potential Russian criminal syndicates from attempting to enter the Kazakhstani market.

¶16. (SBU) Political support for IPR protection takes a variety of forms. A "Patent Palace" will be constructed in Astana by 2009; it will house all government agencies involved in IPR issues, including the IPR Committee and the National Intellectual Property Institute. GOK officials often cast effective IPR protection as a precondition for the development of a flourishing Kazakh (or Kazakhstani) culture. Furthermore, much attention is currently being devoted to reforming Kazakhstan's patent system. A draft law modernizing the framework and bringing it closer to Western norms was passed by Parliament in February 2007, and awaits the President's signature.

¶17. (SBU) In 2006, Kazakhstani IPR officials, their hand strengthened by Kazakhstan's removal from the Special 301 Watchlist, welcomed opportunities to cooperate with the USG. Officials from the IPR Committee, the General Procuracy, the Financial Police, and the Patent Institute participated in training programs organized by the USPTO and the Department of Justice. GOK IPR experts constructively engaged their USG counterparts during bilateral WTO accession talks, and remain willing and open Embassy interlocutors.

COMMENT AND RECOMMENDATION

¶18. (SBU) Keeping Kazakhstan off the Special 301 Watchlist remains the best tool for encouraging continued progress on IPR protection. While much remains to be done, the past year has seen steady improvement on the enforcement, legislative, and institutional fronts. Crucially, the political climate for fostering IPR protection is positive. An appropriate acknowledgement of Kazakhstan's efforts -- keeping Kazakhstan off of the Special 301 Watchlist -- will help preserve the current momentum and create the best climate for ongoing U.S.-Kazakhstani cooperation in this area.

MILAS